88-2019

NO. _____

Supreme Court, U.S.
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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

BARRY GIBBS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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June 12, 1989

QUESTIONS PRESENTED

1. Does the prophylactic rule of Miranda v. Arizona limit police communication with a suspect to a mere recitation of the litany of Miranda warnings, or may a police officer also respond to a suspect's question, "What good will it do me if I say anything?"

2. Where a suspect makes an equivocal reference to counsel, and then asks "What good will it do me if I say anything," may the police fairly respond to his inquiry, or must all discussion cease upon the mere utterance of the word "attorney," an issue upon which other courts are split?

3. When a suspect makes an equivocal reference to counsel, must any subsequent reinitiation of conversation by that suspect be preceded be fresh Miranda warnings?

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Reasons for Granting the Writ

The Pennsylvania court erred in holding that police communication with a suspect is limited to a mere recitation of Miranda warnings, and that a police officer may not respond to a suspect's inquiry as to whether any benefit could ensue from making a statement. This decision is a gross distortion of the policies underlying the prophylactic ruling in Miranda. The Pennsylvania court also erred in ruling that an equivocal reference to counsel precluded the police from responding to respondent's inquiry, and that respondent's question, "What good will it do me if I say anything," was

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IN THE
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OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

BARRY GIBBS,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the final Judgment and Opinion of the Supreme Court of Pennsylvania, which is the highest state court to render a decision in this case.

The Pennsylvania Supreme Court entered its decision on February 2, 1989. Respondent timely applied to the Pennsylvania Supreme Court for reconsideration, and

petitioner cross-petitioned for reconsideration. By Order dated April 13, 1989, the Pennsylvania Supreme Court denied reconsideration (Order attached as Appendix A).

OPINIONS BELOW

The Judgment and Opinion of the Pennsylvania Supreme Court, which are unofficially reported at 553 A.2d 409 (1989), are set forth in full in Appendix B at 1B-15B. The unreported Opinion and Order of the Court of Common Pleas of Pike County, entered on June 24, 1986, denying post-verdict motions, are set forth in Appendix C at 1C-22C. The Opinion and Order of the Court of Common Pleas of Pike County denying reconsideration of sentence are set forth in Appendix D at 1D-4D. The Opinion and Order of the Court of Common Pleas of Pike County denying respondent's pre-trial

motions are set forth in Appendix E at 1E-15E.

STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania entered Judgment on February 2, 1989. The court denied reargument on April 13, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1273(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five, which provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law ...

United States Constitution, Amendment Fourteen, Section 1, Due Process Clause, provides:

> ... [n]or shall any state deprive any person of life, liberty, or property, without due process of law ...

STATEMENT OF THE CASE

On March 27, 1984, respondent was hired to kill Bruce Burke after agreeing to a plan proposed by the intended victim's wife, who hoped to collect the proceeds of a $25,000 life insurance policy. The agreement called for respondent to murder Mr. Burke at the Hemlock Community Association barracks where he was employed as a security guard, and, if necessary, to also wound or kill George Mehl, Mr. Burke's co-worker. Respondent drove to the barracks with Mrs. Burke and other co-defendants, who were also members of the victim's family. He was armed with the intended victim's .357 magnum revolver which Mrs. Burke supplied. Respondent fired six shots through the window of the barracks. One shot struck Mr. Mehl in the head, killing him, however, Bruce Burke escaped serious injury. When Mr. Burke returned home later that evening,

he discovered that his .357 revolver had been removed from its locked case, and that the locked drawer where he kept the bullets for the weapon had been pried open. He turned the gun over to the state police.

After respondent was implicated by his co-defendants, he was arrested on March 29, 1984, pursuant to a warrrant. He was first taken before District Magistrate Laab and advised of his right to bail. Respondent was then transported to the state police barracks at Lords Valley Station. After his arrival, Officer McDevitt asked respondent whether he wished to make any telephone calls, and respondent called his father (N.T. 11/20/84, 5-6, 13; Opinion and Order, Thomson, J., at 4 (dated 11/26/84) (attached as Appendix E)). Thereafter, Officer McDevitt advised respondent of his Miranda rights, and respondent indicated that he understood. Respondent then remarked, "Maybe I should talk to a

lawyer," and asked, "What good will it do me if I say anything?" Officer McDevitt responded, "I really don't know what good it would do. The only thing is I would tell the District Attorney you cooperated for whatever good that would be, but I would have no idea whether it would help your case or not." (emphasis supplied). The other officer present in the room, Corporal Hague, then told respondent that the decision was "strictly up to him, and that [respondent] was there, he knew what happened, and he was the only one that was not family [the co-defendants were related to the intended victim], and he had to make the decision himself on what he should do" (N.T. 11/20/84, 10-11). Respondent replied, "Yes, I am up s---'- creek without a boat. They will shove it up my a--." He then signed the Miranda waiver form and said, "Okay, I will tell you" (N.T. 11/20/84,

10-11; C-1, admitted into evidence at N.T. 11/20/84, 10).[1]

Respondent then made a brief statement. He said that he was approached by three people who pulled up in a car on the night of the slaying, but he was so intoxicated that he did not remember anything else (N.T. 11/20/84, 11). Officer McDevitt told respondent that he did not think respondent was being truthful, and advised respondent, "I don't care if you give a statement or not, that is still up to you. Is that all you want to say about this[?]" (emphasis added). Respondent replied, "Okay, I will tell you again." Officer McDevit responded, "That is up to you are you sure you want to[?]" (emphasis

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[1]Commonwealth Exhibit C-1 is a verbatim account of the entire Miranda colloquy and respondent's statement. It was admitted into evidence at the motion to suppress and is part of the official record in the case.

added). Respondent said, "Yes," and stated that one of the women in the car had asked him if he knew anyone who would waste (kill) someone for them. Respondent answered that he would check it out. When respondent later entered their car, they asked whether he would waste someone, and he once again said that he would check it out. Respondent told Officer McDevitt that he could not remember what else happened. When asked if he would tell the officers how the decedent was killed, respondent replied, "Let me think" (N.T. 11/20/84, 11-12).

Respondent was then left alone for fifteen minutes. Before any further questioning took place, he was brought before District Magistrate James and arraigned. During this preliminary arraignment, the district magistrate readvised respondent of his Miranda rights (N.T. 11/20/84, 12, 24-25; Opinion and Order, Thomson, J., at 4 (filed 11/26/84), Appendix E; C-1).

After being fully advised of his rights by the district magistrate, respondent admitted to Officer McDevitt that he killed the decedent and provided the details of the slaying (N.T. 11/20/84, 12-13; C-1). He thereafter declined to give a written statement, and all questioning ceased (N.T. 11/20/84, 13).

While awaiting transportation to the Pike County jail, respondent asked Officer McDevitt why he did not like him (respondent). The officer asked why he said that, and respondent stated, "Well, [the decedent] was a friend of yours, wasn't he?" The officer said, "Yes, but I can't let that interfere with my job." Respondent replied "But I killed him." Later, while being transported, respondent several times volunteered other remarks admitting the shooting (N.T. 11/20/84, 14; C-1).

HOW THE FEDERAL QUESTION WAS PRESENTED

Prior to trial, respondent filed an Omnibus Pretrial Motion and a Brief in Support of Omnibus Pretrial Motion challenging the admissibility of his statement on voluntariness grounds and on the basis of a denial of his request for counsel.

On November 20, 1984, a hearing was held on respondent's motion to suppress his statements. That motion was denied on November 26, 1984, by the Honorable Harold A. Thomson, Jr., of the Pike County Court of Common Pleas. Respondent's trial commenced on December 10, 1984, before Judge Thomson, sitting with a jury. The jury subsequently convicted respondent of first degree murder and, after a separate sentencing hearing, returned a sentence of death.

On June 24, 1986, the trial court denied respondent's motions for a new trial

and arrest of judgment. Respondent appealed to the Pennsylvania Supreme Court raising, inter alia, a challenge to the admissibility of his statement. On February 2, 1989, the Supreme Court of Pennsylvania reversed respondent's conviction. The court held that respondent's rights under Miranda v. Arizona, 384 U.S. 436 (1966), were violated when Officer McDevitt responded to respondent's inquiry, "Maybe I should talk to a lawyer. What good would it do me if I say anything?" by stating, "I really don't know what good it would do. The only thing is I would tell the District Attorney you cooperated for whatever good that would be, but I would have no idea whether it would help your case or not." The court held that this was an "impermissible inducement" and ruled in the alternative that, even if respondent's statement "Maybe I should talk to a lawyer" were deemed an equivocal request for counsel under Edwards v.

Arizona, 451 U.S. 477 (1981), his ambiguous reference to counsel precluded the officer from responding to respondent's inquiry, "[w]hat good would it do me [to tell you]?" The court also ruled that, in order for a reinitiation of conversation to be "constitutionally permissible," the reinitiation must be preceded by a fresh set of Miranda warnings.

On April 13, 1989, the Pennsylvania Supreme Court denied respondent's and petitioner's applications for reargument. This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

THE PENNSYLVANIA COURT ERRED IN HOLDING THAT POLICE COMMUNICATION WITH A SUSPECT IS LIMITED TO A MERE RECITATION OF MIRANDA WARNINGS, AND THAT A POLICE OFFICER MAY NOT RESPOND TO A SUSPECT'S INQUIRY AS TO WHETHER ANY BENEFIT COULD ENSUE FROM MAKING A STATEMENT. THIS DECISION IS A GROSS DISTORTION OF THE POLICIES UNDERLYING THE PROPHYLACTIC RULING IN MIRANDA. THE PENNSYLVANIA COURT ALSO ERRED IN RULING THAT AN EQUIVOCAL REFERENCE TO COUNSEL PRECLUDED THE POLICE FROM RESPONDING TO RESPONDENT'S INQUIRY, AND THAT RESPONDENT'S QUESTION, "WHAT GOOD WILL IT DO ME IF I SAY ANYTHING," WAS NOT A CONSTITUTIONALLY PERMISSIBLE REINITIATION OF COMMUNICATION BECAUSE IT WAS NOT PRECEDED BY NEW MIRANDA WARNINGS.

The Pennsylvania Supreme Court in this case, and in the related case of Commonwealth v. Zook, 553 A.2d 920 (Pa. 1989), petition for cert. filed, ___ U.S.L.W. ___ (U.S. June ___, 1989) (No. 89-____), has seriously misapplied the decisions of this Court and has effectively ruled that a suspect's equivocal reference to counsel

precludes further communication, regardless of whether this communication was to clarify the ambiguous reference, as in Zook,[2] or to respond to the suspect's reinitiation of the discussion, as here. The effect of an ambiguous reference to counsel is a question which has sharply divided other courts.[3] It is also a question which this

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[2]In Zook, the defendant waived his Miranda rights, and during the course of a subsequent exculpatory statement was confronted with physical evidence against him. He then remarked that he wanted to call his mother to see if she could retain an attorney for him. The Pennsylvania Supreme Court ruled 4-3 that the police violated Zook's fifth amendment rights by inquiring whether he wanted to stop all questioning until he obtained counsel, to which Zook replied, "No, go ahead and finish with what you are doing."

[3]The courts have taken three separate approaches with respect to a suspect's ambiguous reference to counsel. Some courts hold that even an equivocal mention of counsel mandates that all questioning cease. See, e.g., People v. Russo, 148 Cal.App.3d 1172, 196 Cal. Rptr. 466 (1983). Other courts apply a totality of the circumstances test to determine if the suspect

(Footnote Continued)

Court has expressly left open. See Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. 828, 832 n.3 (1987); Smith v. Illinois, 469 U.S. 91, 96 n.3. (1984).[4] This case and

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(Footnote Continued)

actually invoked his right to counsel. See, e.g., People v. Kendricks, 121 Ill. App.3d 442, 459 N.E.2d 1137 (1984); State v. Johnson, 318 N.W.2d 417 (Iowa), cert. denied, 459 U.S. 848 (1982). Still others have adopted a rule that permits the interviewing officer to clarify an ambiguous reference to counsel. See, e.g., United States v. Fouche, 776 F.2d 1398, 1404 (9th Cir. 1985), aff'd on rehearing, 833 F.2d 1284 (9th Cir. 1987), cert. denied, 108 S.Ct. 1756 (1988) (noting that federal courts not in accord on issue); Cannady v. State, 427 So.2d 723 (Fla. 1983); State v. Moulds, 105 Idaho 880, 673 P.2d 1074 (1983); State v. Fussell, 174 N.J. Super. 14, 415 A.2d 351 (1980); State v. Smith, 34 Wash. App. 405, 661 P.2d 1001 (1983).

[4] In Smith v. Illinois, this Court held that an unambiguous request for counsel could not be vitiated by further questioning intended to cast doubt on the initial request. In Connecticut v. Barrett, the Court held that a suspect's statement that he would not make a written statement without the presence of counsel, but had "no problem" talking about the incident, did not render a subsequent oral statement constitutionally infirm.

the Zook case present an opportunity for the Court to resolve this important issue.

This case also presents the opportunity to decide what additional information can be communicated to a suspect beyond the bare litany of Miranda warnings, and what are the constitutional requirements of a reinitiation of communication after a suspect's reference to counsel, matters which sharply divided this Court in Oregon v. Bradshaw, 462 U.S. 1039 (1983) (holding that after an unambiguous request for counsel, Bradshaw's question, "what is going to happen to me now," initiated further conversation under Edwards v. Arizona, 451 U.S. 477 (1981)).

After respondent Gibbs made an equivocal statement that "maybe [he] should contact an attorney," respondent asked Officer McDevitt what good it would do to make a statement. The officer accurately responded that he would tell the district

attorney that he cooperated, but that the officer did not know how that could help respondent. Officer Hague told respondent that only respondent knew what happened, so only respondent could decide whether it would be helpful to make any statement at all. These statements by the officers, when viewed in context, can hardly be characterized as misleading inducement to respondent to confess. In a 4-3 decision, however, the Pennsylvania Supreme Court reversed respondent's first degree murder conviction and sentence of death, and, absent any supporting factual finding by the suppression court, held, as a matter of law, that the officer's response to defendant's inquiry constituted an impermissible inducement. The court ruled that by going beyond the bare recitation of the Miranda warnings, the police officer ran afoul of this Court's prophylactic decision in Miranda v. Arizona, 384 U.S. 436 (1966).

The court held that "[t]he process of rendering Miranda warnings should proceed freely without any intruding frustration by the police." Commonwealth v. Gibbs, infra at 9B.

The Pennsylvania court has imposed a new and unjustified limit on communications between a suspect and the police in complete derogation of the limited prophylactic purpose of Miranda. The police are not required "to ignore the tenor or sense of a defendant's response to [Miranda] warnings." The fundamental purpose of Miranda was "'to assure that the individual's right to choose between speech and silence remains unfettered....'" Connecticut v. Barrett, 479 U.S. 523, 107 S.Ct. at 831 (quoting Miranda v. Arizona, 384 U.S. at 469) (emphasis in original). When a suspect seeks more information in order to make his decision, the police should not be required to mechanically repeat the litany of Miranda warnings

and ignore his inquiry. So long as the police do not seek to mislead the suspect, merely answering a suspect's questions about his decision should not, as a matter of law, taint the suspect's otherwise knowing and intelligent waiver of his rights. Here, the officer stated what respondent surely already knew: that the district attorney would learn about it if he made a statement. The officer emphasized, however, that he had no idea if that would help his case, and the other officer present reminded respondent that he was the only one who knew what happened, so he had to make the decision himself as to whether it would be helpful to make a statement.

The unstated premise underlying the Pennsylvania court's opinion is that a confession is an iniquity, and that the purpose of Miranda is to discourage suspects from making any statements at all. This Court in Miranda, however, flatly rejected such

an approach, and instead recognized society's "need for police questioning as a tool for effective [law] enforcement." The Court noted that "[a]dmissions of guilt are more than merely 'desirable' ... they are essential to society's compelling interest in finding, convicting and punishing those who violate the law." The Court's Miranda requirements balanced society's strong interests in law enforcement with the need to dispel the inherent coercion of custodial interrogation absent Miranda warnings. The Pennsylvania court's ruling serves as disturbing precedent that the lines of communication should not be open before a suspect formally waives his Miranda rights; this issue alone warrants certiorari review by this Court.

The Pennsylvania court also seriously misapplied this Court's decisions in Edwards v. Arizona, supra, and Oregon v. Bradshaw, supra. The court ruled that

respondent's mere mention of the word "lawyer" barred the police from answering respondent's question that was uttered in the same breath as his equivocal reference to counsel. It concluded that the consequences of an unequivocal reference and an equivocal reference to counsel were necessarily the same, and that, therefore, the police could not constitutionally respond to respondent's inquiry as to any possible benefit to making a statement. The court also inexplicably ruled that respondent's question, "What good will it do me if I say anything," could not be considered reinitiation under Oregon v. Bradshaw, "unless there is a prior finding that the initiation was not induced in the first instance but occurred after Miranda warnings were given." Commonwealth v. Gibbs, infra at 10B. Rewarning a suspect after a reference to counsel, however, would constitute impermissible interrogation, Smith v.

Illinois, supra, and as the alleged inducement here occurred after respondent's reinitiation of conversation, it is difficult to understand how the officer's response could retrospectively induce respondent's reinitiation.

The Pennsylvania court has totally misapplied the applicable analysis of the consequences of an equivocal reference to counsel, as well as the standard of reviewing a reinitiation of conversation after a reference to counsel. Thus, the grant of certiorari is also warranted on these additional grounds.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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June 12, 1989

SUPREME COURT OF PENNSYLVANIA
Eastern District
468 City Hall
Philadelphia, PA 19107

April 17, 1989

Ronald M. Bugaj, Esquire
962 Main Street
Honesdale, PA 18431

RE: Commonwealth of Pennsylvania
v. Barry Gibbs, Appellant
NO. 96 E.D. APPEAL DOCKET 1986

Dear Mr. Bugaj:

This is to advise you that the following Order has been endorsed on your Application for Reargument, filed in the above captioned matter:

"April 13, 1989.

Application Denied.

Per Curiam."

Mr. Justice Larsen would grant reargument.

Very truly yours,

/s/
MARLENE F. LACHMAN, ESQUIRE
Prothonotary

/pj
cc: Barry Gibbs
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West Publishing Company

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Commonwealth of Pennsylvania	:	No. 96
	:	E.D. Appeal
	:	Docket 1986
v.	:	
	:	
Barry Gibbs, Appellant	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that Appellant's request for a new trial is granted.

/s/
Marlene F. Lachman, Esq.
Prothonotary

Dated: February 2, 1989

J-150-1988

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 96 E.D. Appeal Docket 1986
	:	
	:	Appeal from the Orders of the Court of Common Pleas of Pike
v.	:	County, Entered on June 24, 1986, and November 4, 1986, at No. 89-1984-Criminal Division
	:	
BARRY GIBBS, Appellant	:	RE-ARGUED: September 27, 1988

OPINION OF THE COURT

FILED: February 2, 1989

MR. JUSTICE PAPADAKOS

This case involves the imposition of a death sentence. The Appellant alleges seventeen errors below. We conclude on one issue that his right to request an attorney pursuant to the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and its progeny was

impaired by the authorities and his subsequent statements were admitted improperly into evidence. For this reason, we order a new trial following automatic review by this Court pursuant to 42 Pa.C.S. §9711 (h)(i).

Appellant was convicted in the shooting death of a security guard. Evidence at the guilt stage of the trial demonstrated that a co-defendant had hired Appellant to kill her husband. The shooting, however, actually resulted in the death of a co-worker guard for which Appellant and several others were arrested two days later. The following testimony relevant to this opinion was given by the State Police Trooper describing his administering of the Miranda warnings:

> Q. O.K. Can you continue? Just tell us what happened when you first started the interview.
>
> A. O.K. I read the Miranda warnings to him. He indicated that he understood. At that particular point he

then asked or he made the statement, "Maybe I should talk to a lawyer. What good would it do me to tell you?" I responded by telling him, "I really don't know what good it would do. The only thing is I would tell the District Attorney you cooperated for whatever good that would be, but I would have no idea whether it would help your case or not."

THE COURT: I might note that the last statement of the witness was done without reading from the paper.

A. I don't really understand.

BY MR. GUCCINI:

Q. O.K. Continue.

A. O.K. Then Corporal Hague also told him that this was strictly up to him, and that he was there, he knew what happened, and he was the only one that was not family, and he had to make the decision himself on what he should do. All right. And referring to the paper, he signed the waiver at 12:05. (Reproduced Record at pp. 333-334.)

Our decision narrowly focuses on the issue of whether the Trooper's response that "the only thing is I would tell the District Attorney you cooperated for whatever good that would be" constituted an impermissible misleading inducement to the

Appellant not to pursue further his ambiguous and equivocal inquiry regarding the presence of an attorney. Our recent opinion in Commonwealth v. Hubble, 509 Pa. 497, 504 A.2d 168 (1986), (per Larsen, J., with two Justices concurring, one Justice concurring specially, and one Justice concurring in part), provides the basis of our disposition of this case.

In Hubble, the Appellee and his wife voluntarily went to the State Police Barracks where Miranda rights were given by the police. At that time, the wife suggested to her husband that he get a lawyer, following which the Appellee stated to the police, "I want a lawyer," and "I want a public defender." The police thereupon encouraged and aided Hubble unsuccessfully to telephone an attorney. At his request, they also succeeded in contacting his probation officer who, likewise, advised Appellee to find a lawyer. The facts

showed that the police advised him that a public defender might not come to the police barracks, while they still continued to urge him to call the public defender. Appellee and his wife then put on their coats, proceeded towards an exit, but after conferring at length and being told that the police now had information placing him at the scene of the crime, Hubble returned to give an inculpatory statement.

In an appeal of the use at trial of the admission, we held in Hubble, first, that Appellee's utterances regarding an attorney were too imprecise to trigger the prophylactic rule barring further police interrogation as required by Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d (1981), reh'g. denied, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981): "To hold that every utterance of the word 'lawyer' automatically" invokes Edwards "would be far too rigid and would not serve

the interests of justice." We also concluded, secondly, that Appellee was not misled by the erroneous police statement regarding the public defender. We then included Appellee's utterances within the totality of circumstances test of Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), which holds that where a suspect rather than the police initiates further conversation, the evidence is not suppressed automatically under Edwards. We buttressed this last conclusion by noting as well that even if the initial admission had been infirm, Hubble voluntarily gave statements later which in any case cured any original defect. We stressed the fact the police "scrupulously honored" Hubble's equivocal statement regarding the need for a lawyer by helping him look up an attorney's telephone number and providing him with a telephone. Finally, in Hubble we made a crucial finding that the suspect was

not misled by the erroneous police statement that the public defender would not travel to the barracks, and we reiterated that conclusion in our opinion. Hubble at 511, 504 A.2d at 173 and 175. We emphasize the absence of any misleading act because it is readily apparent that an opposite finding in Hubble would have resulted in a different outcome.

In the present case under review, we hold that the statement by the authorities to Griggs [sic] was an impermissible inducement and thereby tainted his admissions. By conveying the distinct impression that the district attorney would be told of his cooperation in giving a confession on the spot, there occurred an inescapable inducement which cannot be condoned under our law. For while we recognize that the police have a legitimate responsibility to conduct investigations, including interrogations, criminal suspects have a constitutional

right to make up their own minds as to whether they want the Miranda protections. Promises of benefits or special considerations, however benign in intent, comprise the sort of persuasion and trickery which easily can mislead suspects into giving confessions. The process of rendering Miranda warnings should proceed freely without any intruding frustration by the police. Only in that fashion can we trust the validity of subsequent admissions, for if the initial employment of Miranda is exploited illegally, succeeding inculpatory declarations are compromised. Misleading statements and promises by the police choke off the legal process at the very moment which Miranda was designed to protect.

Our analysis rests squarely on Hubble. There we affirmed the admissibility of a confession only after we were able to determine that the authorities had "scrupulously honored" the suspect's rights and that he

had not been misled by investigative inquiries. Moreover, Hubble's approval of a confession following Appellee's initiation of a conversation with the police itself was predicated on an absence of efforts by interrogators to mislead and induce the suspect and took place after the suspect was read his rights. By contrast, here the improper suggestion of a benefit in return for cooperation poisoned the interrogation system. We are not prepared to say that the Appellant's initiation of conversation in this case is constitutionally permissible unless there is a prior finding that the initiation was not induced in the first instance but occurred after Miranda warnings were given. Since the circumstances of this case preclude such a finding, we now decide that the inculpatory testimony given at the barracks was infirm.

Because we hold that the police engaged in an inducement, there is no need to

address the issue of whether the utterance regarding an attorney was sufficiently precise to pass muster under Hubble. On the one hand, if it is assumed that a valid request was made, Edwards would have halted all further interrogation. Subsequent conversation by the suspect then likewise would be tainted because it would be the product of continuing improper persuasion. On the other hand, if the utterance did not qualify as an unequivocal call for an attorney, at that point the police also were not justified in promoting an admission by suggesting a benefit if the suspect would not ask for representation. In our decision today, we decide only that the authorities are not permitted to employ inducements which impair, in any way, a suspect's right to his own unfettered evaluation of the need for legal counsel. Miranda and its progeny, especially Hubble, otherwise would make no sense.

Appellant's request for a new trial is granted.

The remaining allegations in this appeal are not addressed by this decision.

MR. JUSTICE LARSEN files a Dissenting Opinion in which MR. JUSTICE FLAHERTY and MR. JUSTICE McDERMOTT join.

J-150-1988

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 96 E.D. Appeal Docket 1986
	:	Appeal from the Orders of the Court of Common Pleas of Pike County, Entered on June 24, 1986, and November 4, 1986, at No. 89-1984-Criminal Division
v.	:	
BARRY GIBBS, Appellant	:	RE-ARGUED: SEPTEMBER 27, 1988

DISSENTING OPINION

FILED: February 2, 1989

JUSTICE ROLF LARSEN

I dissent. Contrary to the majority's conclusion, appellant's statements were not inadmissible under Commonwealth v. Hubble, 509 Pa. 497, 504 A.2d 168 (1986). Also, contrary to the majority's conclusion, I do not agree that there was an "impermissible inducement" by police officers in this case that "tainted" appellant's statements.

As we stated in Hubble, Edwards v. Arizona, 451 U.S. 477 (1981), reh'g. denied, 452 U.S. 973 (1981), does not require a police officer to stand mute when an equivocal mention of the word "lawyer" is uttered by an accused who has been given his Miranda warnings. In the instant case, appellant merely stated "Maybe I should talk to a lawyer. What good would it do me to tell you?" The police officer responded, in good faith, that he did not know what good it would do him but that he (the officer) would tell the District Attorney of appellant's cooperation. I do not interpret appellant's question "what good would it do me to tell you" as a request for a legal opinion from the officer on the legal advantages to be gained by securing legal counsel, nor do I interpret "Maybe I should talk to a lawyer" as an unequivocal request to cease interrogation and retain a lawyer; neither did the suppression court make such

interpretations. I would affirm the suppression court and I would uphold the admissibility of appellant's statements.

Mr. Justice Flaherty and Mr. Justice McDermott join in this dissenting opinion.

IN THE COURT OF COMMON PLEAS
OF PIKE COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	NO. 89 - 1984
-vs-	:	
BARRY GIBBS, Defendant	:	

OPINION and ORDER

FACTS:

The matter before the Court is determination of Defendant's Post-Trial Motions. Defendant filed a Motion for Arrest of Judgment and Motion for a New Trial. Defendant seeks a change of venue or venire with regard to the New Trial.

> "The Defendant was arrested on March 29, 1984, in Honesdale, Wayne County, Pennsylvania and a complaint was filed on that date. The Defendant was charged with Criminal Homocide [sic], Criminal Attempt to Commit Homicide, two counts of Criminal Conspiracy to Commit Criminal Homicide and Aggravated Assault.
>
> On April 26, 1984, the Defendant was given a Preliminary Hearing before District Justice Dore N. James. The Defendant was then bound over to the Court of Common Pleas without bail.

> On April 26, 1984, Barry Gibbs was arraigned and pled not guilty to the Commonwealth's charges. A hearing was held on November 20, 1984, on the Defendant's Omnibus Pretrial Motions. The Defendant moves for suppression of oral and written statements taken from him and the co-Defendants: Sharon Ann Burke, Bonnie Lynn Hagan, and Betsy Ann Burke, by the State Troopers. The Defendant seeks suppression of certain physical evidence. A Motion for Severance is requested. The Defendant also seeks a change of venue and psychiatric examination. The Defendant moves to quash certain information. The Defendant also has moved to employ a special investigator." Commonwealth v. Gibbs, No. 89-1984, Criminal Slip op. (Pike Cty.) November 26, 1984.

Defendant's Motion's [sic] for Suppression of Evidence, oral, written and physical were denied. Defendant's collateral Motion for Suppression of co-defendants' statements were granted. Defendant's Motion for a Severance, Psychiatric Examination and Request to Employ a Special Investigator had been previously granted. Defendant's Motion for Change of Venue and Motion to have the Information Quashed were denied.

This case then proceeded to trial. A jury was impanelled after five days of individual voir dire. At the close of the five day trial, the jury found the Defendant guilty of Criminal Homicide in the first degree, two counts of Criminal Attempt to Commit Homicide, two counts of Criminal Conspiracy to Commit Homicide and Aggravated Assault.

Immediately after the verdict of guilty of murder in the first degree was rendered, the sentencing hearing commenced. The aggravating and mitigating circumstances were argued. Defendant then took the stand against the advice of his counsel and the Court and asked the jury:

> "... to set aside all the mitigating factors and follow the D.A.'s recommendations that I get the death penalty. In life in prison you live in prison. You grow old, and you die. I would rather die while I am young." N.T. p. 420.

The jury found that the Defendant should be sentenced to death, finding two aggravating

circumstances which outweigh the mitigating circumstances.

Within the required ten days for filing Post Trial Motions, Defendant filed a Motion for Arrest of Judgment and Motion for New Trial. Subsequently, Defendant filed a Change of Venue or Venire with regard to Defendant's Motion for New Trial. Argument on these motions was continued generally until receipt of transcription of Notes of Testimony and Notes of Voir Dire of Prospective Jurors. Such were filed in October and November of 1985. Argument was ultimately held on May 2, 1986, which gave both parties due time to brief motions and response thereto prior to argument.

OPINION:

The all encompensing [sic] issue for court determination is whether or not the Defendant's Motion for Arrest of Judgment should be granted. The Defendant contends

that the evidence was insufficient to sustain a conviction.

Initially, the Defendant argues that the verdict is contrary to the evidence in that the testimony indicated that the Defendant was under the influence of drugs which caused him to be unaware of the nature and quality of his action at the time the victim was killed. Defendant further contends that due to Defendant's mental condition, drug abuse, beliefs in satanism and his drug induced intoxication at the time the victim was killed, the Defendant did not know that his actions were wrong.

The Defendant's witness, A.J. Turchetti, M.D., was asked at trial after examining the Defendant to speculate as to the effect of various drugs on the brain. Dr. Turchetti delineated the effect of various drugs and combinations thereof, but, he had no evidence that on the night in question the Defendant was suffering

from such effects. Defendant indicated to the Doctor that he had ingested such drugs on the night in question; however, when co-defendant, Bonnie Hagan was asked if she was aware of the Defendant being under the influence of drugs on the evening of the killing, she apparently did not think he was.

> "Q. ... Have you ever been around anyone who has been under the influence of drugs?
> A. Yes, I have.
> Q. On more than one occasion?
> A. Yes, I have.
> Q. So you have been around someone in that condition?
> A. Right.
> Q. Have you ever been around Barry when he was in that condition?
> A. No, I haven't."
> N.T. pp. 39, 40.

In fact, no where [sic] in the testimony do we find any evidence that Barry Gibbs was under the influence of drugs on the night or during the day of the killing.

Commonwealth witness R.L. Sadoff, M.D. also formed the opinion that the Defendant was not suffering from any type of

psychosis, brain or toxic on the evening in question.

"Q. Directing your attention to the evening of the crime, the shooting, based upon the examination of Mr. Gibbs, did you form an opinion as to whether or not Mr. Gibbs was suffering from any sort of phychosis, any sort of mental illness that evening?

A. Yes, I did.

Q. Will you tell us what that opinion is?

A. My opinion was that he was not. There was no evidence that he was having any thought disorder, that he was under any psychosis that evening.

R.L. Sadoff, M.D. - Direct

Q. And so that we understand what evidence or material leads you to make that conclusion?

A. The material is the, number one, all of the police investigations, evaluations and reports, my own evaluation of Mr. Gibbs and the behavior that he was involved in. There is no indication he was out of touch with reality. He knew what he was doing. He knew where he was going. He was aware that this might be a police officer. He did not want to shoot. He was resistant at first and came back to the car, was egged on to go ahead. Even though he said it was then out of his control, that he had no choice, if he were psychotic, out of touch with reality, he would not have in my opinion

> have gone to the right window, aimed the gun at the person, whom he believed was Mr. Burke, and then shot a person. If he were so psychotic, if he were so mentally ill, especially if he was to have an organic brain psychosis, or a toxic psychosis, as is alleged, in that case he would stagger, stumble, his aim would have been off, he would have shot a tree, not realizing what he was doing. If a person is psychotic, they are not doing what they are supposed to be doing purposefully. They are doing something bizarre, totally out of contact with reality. The fact that he was able to carry out the plan that was intended indicated to me that he was not in an organic psychosis. There is no indication of any other type of psychosis he could have had that night. So what he told me as to what he did and all the evidence leads me to that conclusion." N.T. pp. 339-341 (Emphasis added)

Therefore, because no evidence of drug influence on that day exists, we must determine whether or not the Defendant was competent to stand trial.

Dr. Turchetti was asked to form an opinion with regard to Defendant's competency to stand trial. Dr. Turchetti's response was:

> "Well, at the time I saw him, of course, he was not on drugs. He was not on alcohol. He was not psychotic. His mind was clear. I felt that certainly the existence of a personality disorder would not preclude him from being able to cooperate with his counsel in the preparation of a defense. I felt in response to my questions he was aware of the charges against him and he understood the nature of the criminal trial process. So my conclusion was, yes, he was competent to stand trial." N.T. p. 268.

In addition, Dr. Turchetti requested Dr. Krasno to perform a battery of psychological testing "merely to see if there was anything in psychological testing, which would turn up something that I wasn't seeing. This is most likely to occur in a physical examination. After looking at x-rays, he might find a fracture that was there or not." N.T. p. 268. After Dr. Turchetti had an opportunity to review the report, he stated that "It confirmed my diagnosis, and it offered nothing further in the way of psychosis. It just confimed

that what he was seeing was the same thing that I was seeing." N.T. p. 269.

Without further discussion, we find that the verdict was not contrary to the weight of the evidence. We believe that the evidence did not clearly indicate that the Defendant was under the influence of drugs or suffering from a mental condition which caused him to be unaware of the nature and quality of his actions at the time the victim was killed.

The Defendant next contends that the verdict was contrary to the law as given to the jury during the closing. Defendant contends that the jury failed to apply the law of Diminished Capacity under 18 Pa.C.S. §308 and they failed to consider the legal test for insanity as defined by the McNaughten Rule. The aforementioned discussion clearly indicates that insufficient evidence of the Defendant's diminished capacity and/or insanity was presented to the

jury to apply such law. Therefore, the verdict was not contrary to the law.

Defendant's next contention is that the trial court erred in failing to grant the Defendant's Suppression Motion in that oral statements made to Trooper Robert McDevitt were involuntary. We do not believe that any statements given to the troopers were involuntary or taken in contravention of Defendant's constitutional rights as espoused in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966). Because no after-discovered evidence in this regard has been submitted to the court, our position remains identical with our discussion and decision in our November 26, 1984 Opinion and Order. Commonwealth v. Gibbs, No. 89-1984, slip op (Pike Cty. Reporter) November 26, 1984.

Defendant's next contention is that the trial court erred in failing to grant the Defendant's Motion for Change of Venue.

Under Commonwealth v. Tolassi, 413 A.2d 1003 (1980) as cited by the Commonwealth, "A motion for change of venue is within the sound discretion of the trial judge and his decision will not be overturned absent an abuse of discretion." Also under Rule 312 (a) we find that "venue or venire may be changed by that court when it is determined after hearing that a fair and impartial trial cannot otherwise be had in the county where the case is currently pending."

> "Petitions or motions for change of venue or venire are granted if certain criteria are met. 'A comprehensive review of the appellate court cases which have dealt with the issue are found in Commonwealth v. Casper, 481 Pa. 143, 392 A.2d 287 (1978). There the Court said: 'Normally, one who claims that he has been denied a fair trial because of prejudicial pretrial publicity must show actual prejudice in the empaneling of the jury. See Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Commonwealth v. Rolison, supra; Commonwealth v. Hoss, 469 Pa. 195, 201, 364 A.2d 1335 (1976); Commonwealth v. Pierce, 451 Pa. 190, 195, 303 A.2d 209, cert. denied, 414 U.S. 878, 94 S.Ct. 164, 38 L.Ed.2d 124 (1973). But this rule is subject to an important

exception. In certain cases there 'can be pretrial publicity so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity and actual jury prejudice.' Commonwealth v. Frazier, 471 Pa. 121, 127, 369 A.2d 1224, 1227 (1977), because the circumstances make it apparent that there is a substantial likelihood that a fair trial cannot be had. See Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Commonwealth v. Rolison, supra; Commonwealth v. Dobrolenski, 460 Pa. 630, 334 A.2d 268 (1975), citing American Bar Association [S]tandards Relating to Fair Trial and Free Press §3.2 (Approved Draft, 1968); Commonwealth v. Pierce, supra.[6] (Footnote omitted.) It is this exception that we must discuss here.'

The court stated that the mere fact that there has been pretrial publicity and that jurors have some knowledge of the facts attendant upon the crime, does not warrant a change of venue. It then sets standards by which the hearing judge should make a determination of the issue, as follows:

'We instead look to more discrete factors, viz., whether the pre-trial publicity was, on the one hand, factual and objective, or, on the other hand, consisted of sensational inflammatory and 'slanted articles demanding conviction,' United States v. Sayers,

423 F.2d 1135, 1343 (4th Cir. 1970);[7] (Footnote omitted.) whether the pre-trial publicity revealed the existence of the accused's prior criminal record;[8] (Footnote omitted.) whether it referred to confessions, admissions or re-enactments of the crime by the defendant;[9] (Footnote omitted.) and whether such information is the product of reports by the police and prosecutorial officer.[10] (Footnote omitted.) Should any of the above elements be found, the next step of the inquiry is to determine whether such publicity has been so extensive, so sustained and so pervasive that the community must be deemed to have been saturated with it. In this connection the size and character of the area concerned, and more particularly the pervasiveness of the media coverage in the community, warrant consideration." Commonwealth v. Beers et al., No. 95, 105 and No. 96, 104-1984 slip op. (Monroe County June 7, 1984)" Commonwealth v. Burke, No. 85-1984 slip op (Pike Cty. Reporter) December 26, 1984.

In reviewing the factors as applied to the case at bar, we find that the pre-trial publicity was factual and objective and the articles were not slanted demanding conviction. The articles did not reveal the existence of the accused [sic] prior criminal record nor did the articles refer to

confessions or admissions by the Defendant. While some articles referring to reenactments of the crime were published, approximately 28 of 34 were published six-months before the Defendant's trial. Therefore, such articles were long forgotten prior to Defendant's trial.

Furthermore, the publicity was not so extensive as to saturate the community. Defendant contends that during voir dire many prospective jurors were aware of some of the articles; however, the empanelled jury was not prejudiced by such pre-trial articles. As Commonwealth v. Casper, Ibid. stated: "Normally, one who claims that he has been denied a fair trial because of prejudicial pre-trial publicity must show actual prejudice in the empaneling of the jury." It does not appear that actual prejudice was shown in the instant case.

The Defendant next contends that the trial court erred in allowing the admission

into evidence of Commonwealth Exhibit Number 5, a color photograph of the deceased, as it was merely cumulative evidence in light of the previous testimony of Commonwealth witness, Wayne Burke, and any value it may have had was far outweighted [sic] by the passion and prejudice it evoked in the minds of the jurors. We do not agree with this premise as the picture was admitted into evidence to depict the path of the bullets. Prior to trial, all photographs were examined by the court and the photograph admitted into evidence was found not to be inflammatory or offensive. Such evidence was more probative for the Commonwealth's purposes than prejudicial to the Defendant.

Defendant also contends that Dr. Miholakis' sketch of the path of the bullet was cumulative evidence because it was not disputed by the Defendant. Whether or not such path of the bullet was in dispute, the

Commonwealth utilized such diagram to link their evidence. The diagram was not found to be redundant therefore, it was permitted. "Use of diagrams or blackboards is permissible within the trial court's discretion." Commonwealth v. Ayala, 277 Pa. Super. 363, 419 A.2d 1187 (1980).

Next, defendant argues the inapplicability of 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980). The statute reads as follows: "Aggravating circumstances shall be limited to the following: The victim was a fireman, peace officer or public servant concerned in official detention, as defined in 18 Pa. C.S. §5121 (relating to escape), who was killed in the performance of his duties." Defendant claims the victim cannot be classified as a "peace officer" and thus asserts the nonexistence of an aggravating circumstance. Consequently, Defendant asserts that the victim, a private security guard, is precluded from

the scope of coverage enunciated in 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980). Furthermore, Defendant contends the trial court erred in permitting the jury to consider the victim's classification as a "peace officer" pursuant to 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980). We do not agree.

Defendant agrees that the victim, a private security guard, was appointed by the Court as a night watchman as defined by Pa. Stat. Ann. tit. 53 §3704 (Purdon 1895). The statute reads as follows:

> It shall be lawful for any number of persons owning or occupying real estate in any city, borough or township of this commonwealth, upon application to and with the approval of the court of quarter sessions of the proper county, to employ a night watchman or night watchmen for the purpose of protecting their premises and property in the night-time and all persons so appointed, with the approval aforesaid, as night watchman shall have, exercise and enjoy all the rights, powers and privileges, now vested by law in constables or police officers duly elected or appointed in

said cities or boroughs. (Emphasis added).

The operative words in the statute applicable to the instant case are "night watchman shall have, exercise and enjoy all the rights, powers and privileges, now vested by law in constables or police officers." Clearly, a security guard duly appointed as a night watchman, enjoying the rights[,] powers, and privileges of a police officer, falls within the purview of 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980) which states that the killing of a peace officer in the performance of his duties is an aggravated circumstance. Analogous to the case at bar, in Commonwealth v. Beasley, 504 Pa. 485, 475 A.2d 730 (1984), one of the aggravating circumstances found by the jury was that the victim was a peace officer who was killed in the performance of his duties. Clearly, the night watchman in the instant case is properly classified as

a peace officer invoking the provisions set forth in Pa. Stat. Ann. tit. 53 §3704 (Purdon 1895) and thus, the Court's application of 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980) is correct.

Defendant further contends that the victim was not killed in the performance of his duty. Apparently, Defendant espouses this dubious assertion because the victim was not shot while making rounds, investigating a suspicious situation, apprehending a suspect or otherwise performing his duties, but rather the victim had been watching television. "If a police officer were sitting in his patrol car on a coffee break and someone came up and shot him, would it be said that he was not engaged in the performance of this [sic] duties? Certainly not. The victim in this case was on duty during his regular shift, and, in fact, had just come in from a patrol." (N.T. Tiral [sic], p. 20-21). Certainly then,

the victim was performing his duty as a peace officer. Furthermore, the victim was in uniform while on duty in the guard house of the Hemlock Farms Security Office. The testimony of various witnesses indicated that Defendant was fully aware that the victim was a security guard and would be on duty on the evening in question. In fact, the Defendant went to the victim's place of duty to perform the murder. Thus, we believe that there was not error in permitting the jury to consider this factor as an aggravating circumstance.

Finally, the Defendant contends that the charges of criminal homicide of George Mehle and criminal attempt to commit homicide of George Mehle merge and that the charges of criminal homicide and aggravated assault of Wayne Burke merge. This contention is not properly before the court for determination of Defendant's Motion for a New Trial and for Arrest of Judgment. Such

determination shall be considered at the final sentencing of the Defendant.

For the aforementioned reasons, we believe that the Defendant's contentions do not warrant a new trial. Because a new trial is not warranted in the instant case, we shall not consider Defendant's Motion in Arrest of Judgment.

O R D E R

AND NOW, this 24th day of June, 1986, the Defendant's Motion for a New Trial and/or Arrest of Judgment is HEREBY DENIED. Defendant is ordered to report for sentencing on July 17, 1986, at 1:30 P.M.

BY THE COURT:

/s/ Harold A. Thomson, Jr.
P.J.

cc: Michael E. Weinstein, Esq. - for Commonwealth
Douglas J. Jacobs, Esq. - for Defendant
Probation Department
Sidney L. Krawitz, Esq. - Pa D&C

IN THE COURT OF COMMON PLEAS
OF PIKE COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	NO. 89-1984
v.	:	
BARRY GIBBS, Defendant	:	

OPINION AND ORDER

This matter is before the court on Defendant/Petitioner's Brief in Support of Motion to Modify and/or Reconsider Sentence. The issue to be decided is whether the death sentence imposed by this court should be vacated or modified and a life sentence imposed.

I. FACTS

Defendant Barry Gibbs was sentenced by this court on July 17, 1986, based upon a jury's sentencing hearing finding that Gibbs should be sentenced to death. Pursuant to 42 Pa.C.S.A. §9711, this court sentenced the Defendant to death and to two (2)

consecutive jail terms on related charges. The Defendant now files this Motion to Modify Sentence.

II. DISCUSSION

After a careful reading of the sentencing hearing record, we find that the jury acted properly in their imposition of the death sentence. The Defendant is correct in its reference to Commonwealth v. Holcomb, 508 Pa. 425, 498 A.2d 833, 856 (1985), for the balancing test to be used by a jury in sentencing a person to death. The jury balances the precisely defined aggravated circumstances against the extensively allowed mitigating circumstances before imposing the death penalty, according to Holcomb.

It is also true that 42 Pa.C.S.A. §9711, et seq., is very specific as to the aggravated circumstances to be weighed and its broadness as to mitigating circumstances.

But as in Holcomb, the consideration of aggravating circumstances by the jury in their sentencing deliberation, outside of those enumerated in the statute, does not require that a death sentence be vacated or modified.

A review of the record shows that the jury instructions as to the sentencing guidelines were proper. This fact is not disputed. The jury had the duty to use the balancing test explained to them in the instructions and arrive at a decision based on those instructions. The fact that they chose to consider other factors is beyond our control. The United States Supreme Court has recognized the fact that there is no perfect sentencing system, Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); as has the Supreme court of this Commonwealth, Commonwealth v. Zettlemoyer, 500 Pa. 16, 57, 454 A.2d 937, 969 (1982).

We feel that it was possible for the jury balancing aggravating circumstances, (excluding the two mentioned by the jury and not enumerated in 42 Pa.C.S.A. §9711 (d)) against the mitigating circumstances could have found that the death penalty was warranted in this case.

O R D E R

AND NOW, this 4th day of November, 1986, Defendant's Motion to Modify and/or Reconsider Sentence is denied for the aforementioned reasons.

BY THE COURT,

/s/ Harold A. Thomson, Jr.
P.J.

cc: District Attorney
Ronald M. Bugaj, Esq. - for Defendant
Sidney L. Krawitz, Esq. - Pa D&C

IN THE COURT OF COMMON PLEAS
OF PIKE COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	NO. 89-1984
-vs-	:	
BARRY GIBBS, Defendant	:	

OPINION and ORDER

FACTS:

The Defendant was arrested on March 29, 1984, in Honesdale, Wayne County, Pennsylvania and a complaint was filed on that date. The Defendant was charged with Criminal Homicide, two counts of Criminal Attempt to Commit Homicide, two counts of Criminal Conspiracy to Commit Criminal Homicide and Aggravated Assault.

On April 26, 1984, the Defendant was given a Preliminary Hearing before District Justice Dore N. James. The Defendant was then bound over to the Court of Common Pleas without bail.

On April 26, 1984, Barry Gibbs was arraigned and pled not guilty to the Commonwealth's charges. A hearing was held on November 20, 1984, on the Defendant's Omnibus Pretrial Motions. The Defendant moves for suppression of oral and written statements taken from him and the co-Defendants: Sharon Ann Burke, Bonnie Lynn Hagan, and Betsy Ann Burke, by the State Troopers. The Defendant seeks suppression of certain physical evidence. A Motion for Severance is requested. The Defendant also seeks a change of venue and psychiatric examination. The Defendant moves to quash certain information. The Defendant also has moved to employ a special investigator. Each motion will be addressed seriatim.

OPINION:

The Defendant moves for suppression of oral and written statements because he contends his statements were taken in violation

of his constitutional rights and unlawfully in that the Miranda warning was not given. In the alternative, the Defendant alleges if the Miranda warning was adequately given to him, he did not understand the warning since he did not have the mental capacity to give an oral or written statement to the State Troopers. The first issue is whether or not the Defendant was given his Miranda warnings. Trooper McDevitt of the Pennsylvania State Police testified at Defendant's Omnibus Pretrial Motion Hearing that the Defendant was read his Miranda warnings at 11:45 A.M. on March 29, 1984, the day of his arrest. Testimony shows that the Defendant was given his proper Miranda warnings.

The second issue is whether or not the Defendant understood these warnings and knowingly, intelligently and voluntarily gave up his right to remain silent. After Barry Gibbs was read his rights, he said,

"maybe I should talk to a lawyer; what good would it do me if I say anything." Trooper McDevitt responded that he did not know what good it would do; but, that he could only tell the District Attorney that the Defendant had cooperated with them. Corporal William Hague then stated to the Defendant that it was strictly up to him if he wanted to make a statement. At 12:05 P.M. the Defendant signed the Miranda waiver form and proceeded to give a statement. This fact scenerio indicates that the Defendant was cognizant of his right to obtain counsel by his statement "maybe I should talk to a lawyer." It appears that the Defendant, Barry Gibbs, was also aware of his right to remain silent evidenced by his statement, "what good would it do me if I say anything." We can deduce that the Defendant knew he did not have to give a statement to the State Troopers. From his conversation, it is apparent that Barry

Gibbs was read his rights properly and fully understood those rights. Whether or not the Defendant was under the influence of intoxicating drugs or liquor, which he had consumed approximately some forty-eight (48) hours before, is inconsequential. Testimony indicated that the Defendant had no signs of being incoherent. In fact, the troopers did not make any drug tests, because they felt that Barry Gibbs was totally cognizant of surrounding circumstances due to his responses to the Miranda warnings and his general appearance. Defendant's statement was then knowingly, intelligently and voluntarily made.

The Defendant contends that because his statement was stopped for his arraignment, the portion of his statement after the arraignment without readvisement of Miranda warnings, should be suppressed. The third issue is whether or not the Defendant should have been readvised of his

Miranda warnings after he was arraigned. The Defendant's statement was interrupted by his arraignment; however, arraignment generally is an appraisal of rights. District Magistrates advise Defendants that they have the right to have a lawyer present and if they cannot afford an attorney one would be appointed to them. After Barry Gibbs' arraignment, interrogation was reinstated without Miranda warnings; however, the arraignment itself provided further warnings. This statement is admission in toto as evidence if procedural safeguards were used to secure the privilege against self-incrimination. According to Miranda v. Arizona, 384 vs [sic] 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966) "... the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural sageguards effective to secure the

privilege against self-incrimination..." It is quite apparent that procedural safeguards were issued which did secure Barry Gibbs' privilege against self-incrimination.

Furthermore, testimony indicated that there was not a lapse of time between the first portion of Defendant's statement, arraignment and the last portion of the Defendant's statement. For these reasons, the Miranda warnings given at the outset of interrogation and the warnings given during the arraignment fairly apprised the Defendant of his constitutional rights. Therefore, the complete statement given by Barry Gibbs is admissible as competent evidence.

With regard to other statements made after the initial interrogation, we believe they were made knowingly, intelligently and voluntarily. The State Troopers did not initiate further interrogation; but, the Defendant himself asked questions to the

troopers, i.e. "Why are you mad at me?" Under Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Court held: "the Defendant had not been interrogated in violation of his right to remain silent ... since there had been no express questioning of the Defendant." Therefore, the statements made by the Defendant to the State Troopers were not custody plus interrogation. For this reason, Miranda warnings were not again required. So the statements made after the initial warnings were given are not in violation and thus, not suppressable [sic].

In a collateral issue, the Defendant seeks suppression of all written statements made against him by his co-Defendants. The Defendant alleges that co-Defendant's [sic] statements are all hearsay evidence.

> "Under the traditional rules of evidence, a co-Defendant's confession inculpating the accused is inadmissible against the accused as hearsay.

> A major reason underlying the constitutional confrontation rule is to give a Defendant charged with a crime an opportunity to cross-examine the witnesses." Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968).

Thus, any statements made by Barry Gibbs' co-Defendants must be excluded. However, the co-Defendants may testify if they are made available for cross-examination.

The Defendant moves to suppress the physical evidence of three (3) pair of sneakers, one odd sneaker, a white glove, a marijuana pipe, dirt samples and three (3) work gloves which were obtained from a third party's property. The Commonwealth has agreed not to introduce into evidence the marijuana pipe, so this evidentiary matter will not be addressed. The sneakers however, were obtained as a result of a lawful search warrant, which was introduced into evidence at the Omnibus Pretrial Hearing. The search warrant was executed at the home of Wayne Burke where the glove and

dirt samples were also obtained, pursuant to a consent to search by Wayne Burke. Both a lawful search warrant and consent to search are exceptions to the exclusionary rule.

> Under Rule 2002 "A search warrant may be issued to search for and to seize (a) contraband, the fruits of a crime, or things otherwise criminally possessed; or (b) property which is or has been used as the means of committing a criminal offense; or (c) property which constitutes evidence of the commission of a criminal offense."

The search warrant was properly issued to search for and seize anything related to the criminal homicide of George Mehl and the attempted criminal homicide of Wayne Burke. The sneakers seized were lawfully obtained pursuant to the legal search warrant. The glove and dirt samples from Wayne Burke's car were taken pursuant to Wayne Burke's consent to search. These items are admissible as evidence if the consent was freely and voluntarily given. Commonwealth v. Fox, 282 A.2d 341, 445 Pa.

76 (1971). Trooper Bernathy's testimony at Defendant's Omnibus Pretrial Motion Hearing indicated that Wayne Burke consented to the search freely and voluntarily. Therefore, these items will be admissible evidence. Other soil samples were gathered at the scene of the crime and thus are not tantamount to a search.

The Defendant made a Motion for a Severance, which has been granted. This Motion is now moot.

The next Motion made by the Defendant, Barry Gibbs, was a Motion for Change of Venue. The Defendant contends that his right to a fair trial can only be accomplished through a change of venue due to the excessive and prejudicial pretrial publicity.

> On pretrial application for change of venue, we must first determine if potentially prejudicial material was in fact disseminated. In Commonwealth v. Frazier, 471 Pa. 121, 369 A.2d 1224 (1977), this Court defined three types of inherently prejudicial material:

1. References to a defendant's prior criminal record. Commonwealth v. Pierce, 451 Pa. 190, 303 A.2d 209 (1973).

2. References to information received from police that a defendant had confessed. Commonwealth v. Pierce, supra.

3. Reports that go beyond objective reporting and become emotional and inflammatory. Sheppard v. Maxwell, 384 U.S. 333, 86 Ct. [sic] 1507, 16 L.Ed.2d 600 (1966)." [sic] Rolison, supra. 473 Pa. at 268, 374 A.2d at 512. Commonwealth v. Tolassi, 413 A.2d 1003 (1980).

Of the approximately thirty-five (35) newspaper articles and radio broadcasts, none mention the Defendant's prior criminal record. The pretrial publicity does not mention a confession by the Defendant, Barry Gibbs. In addition, the reports are straight objective reporting without emotional and/or inflammatory messages. For these reasons, this Court cannot grant a change of venue. The newspaper articles are simply not prejudicial. Furthermore, the brunt of the articles revolve around

the victim, George Mehl, and Barry Gibbs' co-Defendants, Bonnie Lynn Hagan, Betsy Ann Burke and Sharon Ann Burke.

The next motion presented, requests a psychiatric examination. This motion has been granted which makes this motion moot.

The Defendant moves to have the information quashed because he alleges that he was arrested illegally and unlawfully by the police. The arrest was made pursuant to a warrant which was issued upon probable cause supported by an affidavit sworn before District Magistrate Dore N. James. The requirements for issuance of an arrest warrant are as follows:

> (a) No arrest warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.
>
> (b) At any hearing on a motion challenging an arrest warrant, no evidence shall be admissible to establish probable cause for the arrest warrant

other than the affidavits provided for in paragraph (a).

The issue for resolution is whether or not probable cause existed for the issuance of Defendant's arrest warrant. Trooper Kerry Welsh made a sworn affidavit before District Magistrate Dore N. James which disclosed his interview of two (2) witnesses who heard information that linked Barry Gibbs to the murder scene. It is apparent that the arrest warrant was grounded on adequate probable cause which makes the arrest both legal and lawful. For the aforementioned reasons, Defendant's Motion to quash the information is denied.

In Defendant's last motion, he requests to employ a special investigator. This motion was previously granted; thus, this motion is moot.

O R D E R

AND NOW, this 26th day of November, 1984, Defendant's Motion for Suppression

of Evidence, oral, written and physical is hereby denied. Defendant's collateral Motion for Suppression of co-Defendant's statements is hereby granted. Defendant's Motion for a Severance, Psychiatric Examination and Request to Employ a Special Investigator were previously granted.

Defendant's Motion for Change of Venue and Motion to have the Information Quashed are hereby denied.

BY THE COURT:

/s/ Harold A. Thomson, Jr.
P.J.

cc: Steven R. Guccini, Esq. - for the Commonwealth
Douglas J. Jacobs, Esq. - for the Defendant
Sidney L. Krawitz, Esq. - Pa D&C